

STATE OF MICHIGAN
COURT OF APPEALS

RAYMOND TOWNS,
Plaintiff-Appellant,

UNPUBLISHED
December 17, 2002

v

No. 234950
Wayne Circuit Court
LC No. 00-002929-NH

SINAI HOSPITAL,
Defendant-Appellee,

and

ERIC HANSON, M.D.,
Defendant.

Before: Kelly, P.J. and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Sinai Hospital in this medical malpractice action.¹ We affirm.

I. Basic Facts and Procedural Background

Plaintiff underwent heart valve replacement surgery performed by Eric Hanson, M.D., an employee of defendant. A surgical needle used during the heart valve replacement surgery was left inside plaintiff. Plaintiff did not experience any post-operative chest pain. Approximately three and a half months after the operation, plaintiff was informed of the needle in his chest. Plaintiff went to see a lawyer and another physician because he was upset and was concerned about what would happen.

Plaintiff ultimately filed a negligence claim against defendant. In regard to his injuries, he specifically alleged that he:

¹ Because defendant Eric Hanson, M.D. is not a party to this appeal, all references to defendant solely refer to defendant Sinai Hospital.

21. . . . sustained great bodily injury to body, including but not limited to scarring of internal tissue, movement of needle, metallic poisoning, puncturing of internal organs, and interference with the function of internal organs.

22. . . . sustained great psychological injury, and is receiving treatment for the same.

23. . . . is undergoing great emotional injury as a result of his knowledge of the presence of the surgical needle, and is receiving treatment for the same.

24. . . . sustained great inconvenience, financial loss, embarrassment, humiliation, loss of opportunity, and loss of physical capacity.

Plaintiff's expert, Hayward C. Maben, M.D., stated in his supporting affidavit that plaintiff is undergoing great psychological and emotional injury as a result of his knowledge of the presence of the surgical needle, and is receiving treatment for the same.

However, during Maben's deposition, he testified that the needle is not going to move, will not puncture any of plaintiff's internal organs and will not cause metallic poisoning. Maben additionally testified that plaintiff did not have to get the needle removed because it will not harm plaintiff. Maben's notes from his first visit with plaintiff on December 2, 1999, state: "patient advised needle was not causing any problem at this time." After the lawsuit was filed, plaintiff complained of a "sticking sensation" in his chest, but Maben stated he was not impressed with that complaint because he did not know of anything that would give plaintiff a "sticking sensation" in his chest, and did not believe it was related to the needle.

Defendant moved for summary disposition arguing that plaintiff failed to present evidence that he has suffered compensable damages, either physical or emotional. In response, plaintiff argued he sustained an identifiable injury, i.e., a foreign object wrongfully left in his body, and presented sufficient evidence to show a causal relationship between defendant's negligence and his injury.

Following a hearing, the trial court granted defendant's motion finding plaintiff could not establish the element of damage, physical or emotional. The trial court stated the testimony of plaintiff's own expert, Maben, established very clearly that plaintiff suffered no physical injury or harm due to the retained surgical needle. Although the trial court acknowledged plaintiff has fears, it found these fears alone did not form a basis for recovery.

II. Standard of Review

The grant or denial of a motion for summary disposition is reviewed de novo. *Haliw v City of Sterling Heights*, 464 Mich 297, 301-302; 627 NW2d 581 (2001). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Id.* at 302. Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

III. Summary Disposition

Plaintiff argues the trial court erred by granting defendant's motion for summary disposition because he established an identifiable emotional and physical injury as a result of defendant's negligence. We disagree.

The plaintiff in a medical malpractice action must prove (1) the applicable standard of care, (2) breach of that standard by the defendant, (3) injury and (4) proximate causation between the alleged breach and the injury. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 10; 651 NW2d 356 (2002). Failure to prove any one of these elements is fatal to plaintiff's claim. *Id.*

It is the third element, injury, that is at issue here. In regard to plaintiff's alleged emotional injury, the evidence indicates that plaintiff was upset. However, plaintiff's upset does not rise to the level of a compensable injury within the context of his medical malpractice claim. "[W]here a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff in a properly pleaded and proved action may recover in damages for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock." *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970); *Bernhardt v Ingham Regional Medical Center*, 249 Mich App 274, 279, n 2; 641 NW2d 868 (2002); see also *Stites v Sundstrand Heat Transfer, Inc.*, 660 F Supp 1516, 1526 (WD Mich 1987). Thus, in order to recover from defendant, plaintiff had to prove a definite and objective physical injury.

Here, there was no evidence showing that plaintiff was physically injured. The only physical injury plaintiff complained of was a "sticking sensation" in his chest, but plaintiff's expert testified this sensation was not related to the retained needle. Plaintiff denied any chest pain in his post-operation appointment with his attending physician. When plaintiff was seen at the medical clinic following his operation, he had no complaints of any pain related to the needle. Plaintiff's expert also testified that the needle was not going to move, would not puncture any of plaintiff's internal organs and would not cause metallic poisoning. Additionally, plaintiff did not have to get the needle removed because it would not harm plaintiff.

Plaintiff also argues that damages may include compensation for mental pain and anxiety. While this is true, *Veselenak v Smith*, 414 Mich 567, 574; 327 NW2d 261 (1982), plaintiff overlooks the fact that there can be no damages if plaintiff fails to prove the elements of his cause of action. Damages are distinguishable from the element of injury.

Because plaintiff did not present sufficient evidence to create a genuine issue of material fact regarding an objective and physical injury, we conclude that the trial court did not err in granting summary disposition in favor of defendant.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio